Sharma Kumari a/p Oam Prakash v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41–139 OF 1999
ABDUL WAHAB J
24 JANUARY 2000

Criminal Procedure — *Trial — Postponement — Conduct of trial in haste — Discretion of court to fix date of hearing — Counsel has to appear in superior court on same date — Whether trial should have been postponed — Legal Profession (Practice and Etiquette) Rules 1978 r 6(a)*

Evidence — *Character of accused — Bad character — Indecent or scandalous questions to a married woman — Discretion of court to admit evidence — Whether questions relate to facts in issue or matters necessary to be known — Evidence Act 1950 ss 54 & 146*

The appellant was tried upon a principal and an alternative charge under the second and first limbs respectively of s 182 of the Penal Code. Aggrieved with her conviction and sentence of 12 weeks imprisonment by the magistrate's court after a full trial, she appealed against both convictions and sentence. The grounds of appeal were, inter alia: (i) the magistrate erred in conducting the trial with unholy haste and hurry and ordered repeatedly the case to proceed almost continuously on dates which were never scheduled for the hearing of this case irrespective of whether or not the defence counsel was engaged in superior court which had fixed hearing dates prior to this case; (ii) the magistrate erred in allowing evidence of bad character; and (iii) the magistrate did not say that he had applied a maximum evaluation or that he had applied the test of proof beyond reasonable doubt.

Held, dismissing the appeal:

(1) From the record, all the days upon which the hearing was conducted was the subject of an order of court on the record. No hearing was heard at a time not reflected by a prior order. The hearings could not be said to have been heard on dates not scheduled. The principle reflected clearly in s 259 of the Criminal Procedure Code is that a trial will proceed on the date fixed for the purpose and if it cannot be completed, it will continue until it is completed. It is not automatic (see pp 304H–305A).

(2) The discretion to fix the date is with the court. As with all discretion, it is to be exercised judicially. But once the order is made, and whether one agrees with a decision or order or not, the law remains that once the court makes an order, it is to be complied with until it is set aside. The personal problem of counsel having too many commitments for appearances in other courts cannot interfere with the schedule of the courts. Otherwise all trials can be postponed indefinitely by the simple device of

every accused person appointing the same counsel and he accepts all appointments. That cannot be in the interest of justice and of other lawyers. Further r 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 clearly provides that an advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day (see pp 305G, 307C–F).

(3) There is no principle that a lower court must vacate a hearing date because a counsel who is to appear in the lower court has to appear in a superior court. The powers of all courts to administer its own schedule remains with each court. Section 259 of the Criminal Procedure Code provides that adjournment may be granted for reasonable cause. Having to appear in another court is not a reasonable cause, for it leaves it to the counsel concerned to decide on his own in which court he prefers to appear (see p 307A–B).

(4) Other than the assertion of an error in the grounds of appeal, nothing had been shown that the magistrate had in fact erred in law or principle, and with the result that a miscarriage of justice had been occasioned. Indeed it must be said the magistrate had conducted his duties with rectitude and commendable restraint in circumstances in the trial (`see pp 307I–308A).

(5) The words in ss 54 and 146 of the Evidence Act 1950 are clear. Bad character evidence per se is not relevant, but the section makes it clear that the bar can have exceptions. Section 146 specifically provides that questions may be put to test his accuracy, veracity or credibility. It widened the area of exceptions. If all evidence of a criminal act is barred as evidence of bad character, no crime could be proven. Such an interpretation is a gross misinterpretation of the law. In the present case, even if the questions relate to matters that were indecent or scandalous because the appellant is a married woman at the time, the questions were clearly not intended simply to insult or annoy, but clearly relate to facts in issue or matters necessary to be known and in which the court has the discretion to admit into evidence (see p 312A–C, G).

(6) The magistrate had not departed from the wording of s 173(h) of the Criminal Procedure Code. While he did not say he had applied a maximum evaluation or that he had applied the beyond reasonable test, it could not be said that he said he had applied any other lesser standard. The argument goes that the benefit of the doubt should be given to the appellant is answered by s 114(e) of the Evidence Act that judicial acts are regularly performed, in other words that unless he said he has applied another or lesser standard, he is deemed to have applied the correct standard where he has used the exact words of the statute (see p 313B–C).

(7) Further, it is clear that after the close of the prosecution case, no further evidence against the appellant was adduced towards directly proving the elements of the charges against her. The only further evidence adduced was by the appellant in her defence. The evidence directly relied upon in holding that the prosecution had proved its case beyond reasonable doubt was the same evidence that was on record in the prosecution case. It could not be said the magistrate could not have called for defence unless he had applied a lesser standard (see p 313C–E).

(8) The submission that the magistrate relied on conjecture and surmise was unwarranted. The magistrate had considered and dealt with all the possible concerns and rejected them in arriving at his conclusion based on the evidence of the witnesses. The judgment reflected a process of consideration of various possible doubts, and properly drew his conclusion from the appellant's refusal to answer. The appellant had every opportunity to answer the questions in the presence of counsel when the trial was reopened, by dealing with those issues in her evidence, but did not do so (see p 319A–B).

(9) It was clear that the magistrate had given a clear and reasoned judgment setting out all of the relevant matters he ought to consider and had not wasted time with irrelevant matters. All of the grounds of appeal in relation to conviction were based on arguments on facts. These arguments centred on peripheral facts that had little if any effect on the unshaken evidence of direct, independent witnesses. There were no important legal issues to be decided because in the particular fact situation and the evidence, the legal issues sought to be raised were irrelevant or inapplicable (see pp 319G–320A).

(10) All of the grounds argued in respect of sentence had been advance upon the magistrate and he had considered them. There was no specific submission that he had erred in law or that the sentence was manifestly excessive. In all the circumstances and having considered possible application of s 173A or s 294 of the Criminal Procedure Code, taking into account that no arrests were made, the court could not say that the sentence of the magistrate was manifestly excessive or wrong in law (see p 320B, F).

[Bahasa Malaysia summary

Perayu telah dibicarakan atas pertuduhan utama dan alternatif di bawah bahagian kedua dan pertama masing-masing s 182 Kanun Keseksaan. Oleh kerana terkilan dengan sabitannya dan hukuman pemenjaraan selama 12 minggu oleh mahkamah majistret selepas perbicaraan penuh, beliau merayu terhadap kedua-dua sabitan dan hukuman. Alasan-alasan rayuan adalah, antara lain: (i) majistret telah

A silap di dalam menjalankan perbicaraan dengan sebegitu segera dan terburu-buru dan mengarahkan berkali-kali agar kes dimulakan hampir secara berterusan pada tarikh-tarikh di mana tidak pernah dijadualkan untuk pendengaran kes tidak kira sama ada atau tidak peguambela telah diminta untuk mewakili di mahkamah atasan yang telah menentukan tarikh-tarikh penetapan perbicaraan sebelum kes B ini; (ii) majistret silap di dalam membenarkan keterangan perlakuan buruk; dam (iii) majistret tidak mengatakan bahawa beliau telah memohon penilaian maksimum atau beliau telah memakai ujian pembuktian sehingga tiada keraguan munasabah.

C **Diputuskan**, menolak rayuan tersebut:

(1) Daripada rekod-rekod, semua hari-hari di mana perbicaraan telah dijalankan adalah subjek perintah mahkamah di atas rekod. Tiada perbicaraan telah didengar pada masa yang dibayangkan oleh perintah terdahulu. Perbicaraan-perbicaraan tidak boleh dikatakan telah didengar pada tarikh yang tidak D dijadualkan. Prinsip yang dibayangkan secara jelas di dalam s 259 Kanun Acara Jenayah adalah bahawa suatu perbicaraan akan dimulakan pada tarikh yang ditetapkan bagi tujuan tersebut dan jika ia tidak boleh disempurnakan, ia akan berterusan sehingga ia disempurnakan. Ia bukanlah automatik (lihat ms 304H–305A).

E

(2) Budi bicara untuk menetapkan tarikh adalah pada mahkamah. Seperti juga dengan budi bicara yang lain, ia mestilah dilaksanakan secara kehakiman. Tetapi selepas perintah telah dibuat, dan tidak kira sama ada seseorang bersetuju dengan perintah tersebut atau tidak, undang-undang adalah tetap bahawa selepas F mahkamah membuat sesuatu perintah, ia mestilah dipatuhi sehingga ia diketepikan. Masalah peribadi peguam yang mempunyai terlalu banyak komitmen untuk hadir di mahkamah yang lain tidak boleh menjejaskan jadual mahkamah-mahkamah. Jika tidak, semua perbicaraan-perbicraan boleh ditangguhkan pada masa yang tidak menentu dengan alasan mudah bahawa G semua orang yang tertuduh melantik peguam yang sama dan beliau menerima semua perlantikan. Ini bukanlah bagi kepentingan keadilan dan peguam-peguam yang lain. Selanjutnya, k 6(a) Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 jelas memperuntukkan bahawa H seorang peguambela dan peguamcara tidak boleh menerima sebarang arahan kecuali beliau pasti secara munasabah dapat hadir dan mewakili anak guam pada hari yang diperlukan (lihat ms 305G, 307C–F).

(3) Tiada prinsip bahawa suatu mahkamah bawahan mestilah menangguhkan suatu tarikh perbicaraan kerana peguam yang I sepatutnya hadir di mahkamah bawahan perlu hadir di hadapan mahkamah atasan. Kuasa-kuasa semua mahkamah untuk memakai jadualnya sendiri kekal dengan mahkamah masing-

masing. Seksyen 259 Kanun Acara Jenayah memperuntukkan bahawa suatu penangguhan boleh diberikan untuk sebab yang munasabah. Alasan terpaksa menghadiri mahkamah yang lain bukanlah sebab yang munasabah, oleh kerana ia adalah terpulang kepada peguam yang berkenaan untuk memutuskan sendiri di mana mahkamah yang beliau pilih untuk menghadiri (lihat ms 307A–B) .

(4) Selain daripada penegasan kesilapan di dalam alasan-alasan rayuan, tiada apa-apa telah ditunjukkan bahawa majistret pada hakikatnya telah silap dari segi undang-undang dan prinsip, dan dengan akibat bahawa ketidakadilan telah berlaku. Sudah tentu ia boleh dikatakan bahawa majistret telah menjalankan kewajipannya dengan ikhlas dengan sekatan munasabah di dalam keadaan-keadaan perbicaraan tersebut (lihat ms 307I–308A).

(5) Perkataan-perkataan di dalam ss 54 dan 146 Akta Keterangan 1950 adalah jelas. Keterangan perlakuan buruk semata-mata adalah tidak berkaitan tetapi sekyen menjadikannya jelas bahawa sekatan tersebut boleh mempunyai kekecualian-kekecualiannya. Seksyen 146 secara spesifik memperuntukkan bahawa soalan-soalan boleh diutarakan untuk menguji ketepatan, kebenaran atau kebolehpercayaannya. Ia telah meluaskan ruang lingkup kekecualian-kekecualian. Jika semua keterangan suatu tindakan jenayah dihalang sebagai keterangan perlakuan jahat, tiada jenayah boleh dibuktikan. Penafsiran sedemikian adalah penafsiran undang-undang yang terlalu menyimpang dari segi undang-undang. Di dalam kes ini, walaupun persoalan-persoalan adalah berkaitan dengan perkara yang merupakan tidak senonoh atau penuh skandal kerana perayu adalah wanita berkahwin pada masa itu, soalan-soalan tersebut adalah jelas bukan diniatkan untuk menghina atau menganggu, tetapi jelas berkaitan dengan fakta-fakta isu atau perkara-perkara yang perlu diketahui dan di mana mahkamah mempunyai budi bicara untuk menerima keterangan tersebut (lihat ms 312A–C, G).

(6) Majistret tidak menyimpang daripada perkataan s 173(h) Kanun Acara Jenayah. Walaupun beliau tidak memakai penilaian maksimum atau beliau memakai ujian melampaui keraguan munasabah, ia tidak boleh dikatakan bahawa beliau telah memakai apa-apa standard yang kurang. Hujahan bahawa faedah keraguan mestilah diberikan kepada perayu telah dijawab oleh s 114(e) Akta Keterangan bahawa tindakan-tindakan kehakiman dilaksanakan dengan betul, dalam perkataan-perkataan lain kecuali beliau memakai suatu standard yang lain atau berkurangan, beliau dianggap telah memakai standard yang betul di mana beliau telah menggunakan perkataan sebenar statut (lihat ms 313B–C).

(7) Selanjutnya, ia adalah jelas bahawa selepas penutupan kes pendakwaan, tiada keterangan selanjutnya telah dikemukakan

untuk membuktikan secara terus elemen-elemen pertuduhan-pertuduhan terhadapnya. Keterangan selanjutnya yang telah dikemukakan adalah semasa pembelaan perayu. Keterangan yang digantung harap secara terus di dalam memutuskan bahawa pihak pendakwaan telah membuktikan kes sehingga melampaui keraguan munasabah adalah keterangan yang sama di atas rekod di dalam kes pendakwaan. Ia tidak boleh dikatakan bahawa majistret tidak akan memanggil pembelaan jika beliau memakai standard yang lebih rendah (lihat ms 313C–E).

(8) Hujahan bahawa majistret bergantung kepada tekaan dan agakan adalah tidak berasas. Majistret telah mempertimbangkan dan melihat setiap kemungkinan dan telah menolaknya di dalam mencapai kesimpulannya berdasarkan keterangan-keterangan saksi-saksi. Penghakiman membayangkan suatu proses pertimbangan pelbagai keraguan yang mungkin dan secara wajar telah membuat kesimpulan daripada keengganan perayu untuk menjawab. Perayu mempunyai banyak peluang untuk menjawab soalan-soalan tersebut di hadapan peguam apabila perbicaraan dijalankan semula, dengan menangani isu-isu tersebut di dalam keterangan, tetapi tidak berbuat demikian (lihat ms 319A–B).

(9) Adalah jelas bahawa majistret telah memberikan penghakiman yang jelas dan rasional dengan membentangkan semua perkara-perkara berkaitan yang beliau patut pertimbangkan dan tidak membuang masa dengan perkara-perkara yang tidak berkaitan. Semua alasan-alasan rayuan yang berkaitan dengan sabitan adalah berdasarkan hujahan-hujahan fakta-fakta. Hujahan-hujahan ini tertumpu kepada fakta-fakta yang tidak berapa penting yang mempunyai kesan yang sedikit jikalau ada kesan sekalipun kepada keterangan terus yang kuat oleh saksi-saksi bebas. Tiada lagi isu-isu undang-undang yang perlu diputuskan oleh kerana di dalam situasi fakta yang khusus dan juga keterangan, isu-isu undang-undang yang dipohon untuk dibangkitkan adalah tidak berkaitan atau tidak terpakai (lihat ms 319G–320A).

(10) Semua alasan-alasan yang dihujahkan berkaitan dengan hukuman telah pun diutarakan kepada majistret dan beliau telah mempertimbangkannya. Tiada hujahan spesifik bahawa beliau telah silap dari segi undang-undang atau hukuman tersebut adalah dengan jelas melampau. Di dalam semua keadaan-keadaan dan selepas mempertimbangkan kemungkinan pemakaian s 173A dan s 294 Kanun Acara Jenayah, dengan mengambil kira tiada tahanan telah dibuat, mahkamah tidak boleh mengatakan bahawa hukuman majistret adalah dengan jelas melampau atau salah di sisi undang-undang (lihat ms 320B, F).]

Notes

For cases on trial generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3206–3638.

For cases on character of accused generally, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 469–477.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (refd)
Awaluddin bin Suratman & Ors v PP [1992] 1 MLJ 416 (refd)
Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)
Magor & St Mellons Rural District Council v Newport Corp [1951] 2 All ER 839 (refd)
Mohamed Ekram v PP [1962] MLJ 129 (refd)
Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors [1988] 3 MLJ 82 (refd)
PP v Foong Chee Cheong [1970] 1 MLJ 97 (refd)
PP v Ismail bin Atan [1993] 2 CLJ 1253 (refd)
PP v Tanggaah [1972] 1 MLJ 207 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 113, 173(h), 173(m), 173A, 257(i), 259, 271, 294, 304(iv), 307(vi), 312(i)
Criminal Procedure Code s 195 [India]
Dangerous Drugs Act 1952 s 39B
Evidence Act 1950 ss 54, 114(e), 114(g), 132, 146, 148, 151, 152
Legal Profession (Practice and Etiquette) Rules 1978 r 6(a)
Penal Code (FMS Cap 45) s 182
Practice Direction [1961] MLJ xxxiii

Appeal from: Arrest Case No 85–1 of 1999 (Magistrate's Court, Kuala Lumpur)

Gurbachan Singh (*Bachan & Kartar*) for the appellant.
Salehuddin bin Saidin (Deputy Public Prosecutor, Attorney General's Chambers).

Cur Adv Vult

Abdul Wahab J: The appellant, Sharma Kumari a/p Oam Prakash was tried upon a principal and an alternative charge under the second and first limbs respectively of s 182 of the Penal Code (FMS Cap 45) ('the Penal Code'). Aggrieved with her conviction and sentence of 12 weeks imprisonment by the magistrate's court after a full trial, she has appealed against both conviction and sentence. The charges are as follows:

Principal Charge

'Bahawa kamu pada 5 Januari 1998 jam lebih kurang 7.40 pagi, di hadapan Sekolah Kebangsaan Bukit Bandaraya, Jalan Bangkung, Bangsar, di dalam Daerah Brickfields, dalam Wilayah Persekutuan, telah

memberi maklumat palsu kepada Zamri bin Isthnin seorang penjawat awam, maklumat yang berbunyi 'ada 4 lelaki Melayu cuba hendak culik anak saya dan dia (sambil menunding jarinya ke arah Abdullah Sani bin Hashim) adalah abang kepada salah seorang 4 lelaki yang mahu culik anak saya' dengan niat menyebabkan penjawat awam tersebut membuat sesuatu iaitu membuat soal siasat ke atas Abdullah Sani bin Hashim, yang mana penjawat awam tersebut tidak akan membuatnya sekiranya maklumat yang sebenar diketahui olehnya, oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 182 Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama.'

Alternative Charge

'Bahawa kamu pada 5 Januari 1998 jam lebih kurang 7.40 pagi, di hadapan Sekolah Kebangsaan Bukit Bandaraya, Jalan Bangkung, Bangsar, di dalam Daerah Brickfields, dalam Wilayah Persekutuan telah memberi maklumat palsu kepada Zamri bin Isthnin seorang penjawat awam, maklumat yang berbunyi 'ada 4 lelaki Melayu cuba hendak culik anak saya dan dia (sambil menuding jarinya ke arah Abdullah Sani bin Hashim) adalah abang kepada salah seorang 4 lelaki yang mahu culik anak saya' dengan niat menyebabkan penjawat awam tersebut menggunakan kuasanya bagi menyebabkan kegusaran kepada Abdullah Sani bin Hashim, oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 182 Kanun Keseksaan yang boleh dihukum di bawah seksyen yang sama'.

In support of her appeal she has filed a petition of appeal comprising 56 grounds of appeal as follows:

(1) The learned magistrate erred in conducting the trial with unholy haste and hurry and ordered repeatedly the case to proceed almost continuously on dates which were never scheduled for the hearing of this case irrespective of whether or not the defence counsel was engaged in superior court which had fixed hearing dates prior to this case.

(2) The learned magistrate erred in considering this case a case of priority.

(3) The learned magistrate erred in not holding that PW1, the complainant, was an interested witness who had filed a civil suit against the accused and therefore his evidence needed corroboration.

(4) The learned magistrate erred in not holding that PW1 lodged a police report some ten (10) days later with no reasonable or acceptable explanation for the delay.

(5) The learned magistrate erred in not holding PW1 's late report was a clear afterthought.

(6) The learned magistrate erred in not holding that PW1 did not amount to corroboration.

(7) The learned magistrate erred in not holding that PW1 was a witness with a purpose of his own to serve and therefore his evidence needed to be corroborated.

(8) The learned magistrate erred in allowing inadmissible hearsay evidence to be admitted to the grave prejudice of the appellant.

(9) The learned magistrate erred in not drawing an adverse inference against the prosecution for failing to call the recipient of the complaint, En Sharani, made by the appellant and for not introducing a copy of the information recorded by En Sharani which formed a material and vital part of the narrative of the prosecution's case.

(10) The learned magistrate erred in not properly and critically examining and analyzing the evidence of PW1, PW2 and PW3 which materially contradicted each other.

(11) The learned magistrate erred in not holding from the evidence of PW2 and PW3 that the complaint made to PW2 and PW3 was by the husband of the appellant whilst the appellant was not even there.

(12) The learned magistrate erred in disallowing/overruling the objections made by the appellant's counsel in the course of the proceedings.

(13) The learned magistrate erred in repeatedly allowing irrelevant evidence to be admitted to the grave prejudice of the appellant.

(14) The learned magistrate erred in allowing evidence of bad character of the appellant being admitted despite strenuous objections by the defence counsel.

(15) The learned magistrate erred in not holding that the prosecution was bound in law to prove a case beyond reasonable doubt under s 173(m) of the Criminal Procedure Code at the close of the prosecution case.

(16) The learned magistrate erred in calling for the defence of the appellant when he should have held that the prosecution had fail to prove its case.

(17) The learned magistrate erred in not holding that the prosecution had failed to prove the ingredients of the offence required to be proved under s 182 of the Penal Code.

(18) The learned magistrate erred in not holding that PW1 had materially contradicted himself and had been materially contradicted by PW2, PW3 and PW4 thereby completely destroying his veracity and credibility.

(19) The learned magistrate erred in not holding that the oral evidence of PW1 and exh P1 contradicted the charge.

(20) The learned magistrate erred in admitting exh P1 in evidence when it was not a first information report.

(21) The learned magistrate erred in not holding that the prosecution had failed to prove that the alleged information was false and or that the appellant did not believe it to be true.

(22) The learned magistrate erred in not holding that it was not proved beyond a reasonable doubt that the appellant gave the alleged information.

(23) The learned magistrate erred in drawing an adverse inference against the appellant from her refusal to answer question relating to bad character which she was entitled to refuse to answer.

(24) The learned magistrate erred in not drawing an adverse inference against the prosecution to adduce in evidence the station diary or the patrol car diary or a copy thereof or the police pocket diary of SF2 and SF3 which contained the information given by the appellant which would be the best evidence.

(25) The learned magistrate erred in not holding that the mere making of inquiry by SP2 and SF3 from SF1 cannot constitute an ingredient of an offence under s 182 of the Penal Code.

(26) The learned magistrate erred in not concluding that there was a material contradiction in the version of SP2 and SP3 as regards the alleged information.

(27) The learned magistrate erred and misdirected himself in not at all properly and adequately examining and analysing the evidence of the prosecution witnesses which contradicted each other and favoured the appellant and was sufficient to raise a reasonable doubt.

(28) The learned magistrate erred in not holding that there was no proper investigation in the case and that it was wrong or improper for SF6, a vital witness in this case, to conduct or assist in the investigation.

(29) The learned magistrate erred in not drawing an adverse inference against the prosecution for failure to adduce in evidence the police report No 317/98.

(30) The learned magistrate erred in not holding that there was evidence of a grudge held by SP1 and the brother of SP1 against the appellant.

(31) The learned magistrate erred in not considering the case from all angles and probabilities.

(32) The learned magistrate erred in not holding that there were material contradictions between the evidence of SP5 and SP7.

(33) The learned magistrate erred in not holding that the prosecution case was completely refuted and rebutted by exhs D6, D7, D8, D9, D10, D11, D14 and D15 and D29 and D30.

(34) The learned magistrate erred in not holding that without a complaint by SF2 and/or SF3 a charge under s 182 of the Penal Code was unsustainable.

(35) The learned magistrate erred in not holding that all statements allegedly made by the appellant to SP2 and SP3 were inadmissible against the appellant.

(36) The learned magistrate erred in not taking into account and considering as to why Pradeep Kumar who admitted giving the information as also testified by SF2 and SF3 was not charged under s 182 of the Penal Code.

(37) The learned magistrate erred in not holding that even on the assumption that the alleged information was given, it could not possibly have referred to the complainant in view of SP3's evidence that ' 4 lelaki melayu bermotosikal cuba culik anak'.

(38) The learned magistrate erred in not holding that even if the alleged information was given by the appellant she was justified in giving such information in view of all the background and facts and circumstances of the case as there was a reasonable fear and suspicion entertained by the appellant that her child was attempted to be kidnapped. A

(39) The learned magistrate erred in not drawing an adverse inference against the prosecution for not calling Dato Abdullah Hishan at least as a rebuttal witness. B

(40) The learned magistrate erred in not holding that the appellant's defence which was materially corroborated by the defence witnesses and by documentary evidence was reasonable, probable and believable and sufficient to raise a reasonable doubt. C

(41) The learned magistrate erred in not holding that with the admission of SF3 which was corroborated by SF2 and SF3 clearly a reasonable doubt had been cast by the appellant.

(42) The learned magistrate ought to have held that without the appellant's police report D11 having been investigated and found to be false the charge was unsustainable. D

(43) The learned magistrate erred and misdirected himself in not adequately and sufficiently considering D14 which clearly showed that the appellant never saw the complaint's brother at school on 5 January 1998 and therefore could not possibly have given the alleged false information. E

(44) The learned magistrate erred in not considering D30 which was the first information and the contents of which material corroborated the appellant defence and destroyed the prosecution case.

(45) The learned magistrate erred in not according due weight to exhs D17 and D34 which were made at the final opportunity and were further corroboration of the defence. F

(46) The learned magistrate erred in not holding that there was no allegation of any criminal act against the appellant.

(47) The learned magistrate erred in not concluding that not a single eye witness was called to show that the information given by SD3 and allegedly given by the appellant was false or not believed to be true. G

(48) The learned magistrate erred in not holding that mere suspicion was not proof.

(49) The learned magistrate erred in not giving the benefit of doubt to the appellant. H

(50) The learned magistrate erred and misdirected himself in placing too high a burden upon the appellant.

(51) The learned magistrate erred in relying on conjecture and surmise to make findings and inferences against the appellant. I

(52) The learned magistrate erred and misdirected himself in misreading and his misappreciating the contents of D30, D11 and D14.

(53) The learned magistrate erred in making a completely untrue and erroneous observation that the appellant's counsel had attempted to suggest an answer to the appellant which never happened and which observation was never made by the learned magistrate to the appellant's counsel during the proceedings nor was such an allegation made by the learned deputy public prosecutor.

(54) The learned magistrate erred in drawing an adverse inference against the appellant from her refusal to answer question relating to bad character which she was entitled to.

(55) The learned magistrate erred in not giving a reasoned and speaking judgment.

(56) In any event the sentence imposed upon the appellant was manifestly excessive and unjustified in the circumstances.

Before proceeding any further, reference to s 307(vi) of the Criminal Procedure Code is useful. It provides:

> (vi) Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred.

The object of s 307(vi) in requiring the grounds of appeal, being a short statement of the substance of the judgment appealed against, and the particulars of the points of law or of fact in regard to which the court appealed from is alleged to have erred, is to enable: (i) the appellate judge to act under s 312(i) of the Criminal Procedure Code to decide whether or not to reject the appeal summarily or to direct the registrar to enter the appeal on the list of appeals to be heard and to give notice to the parties accordingly; and (ii) in the event the appeal is entered upon the list of appeals to be heard, to enable the other party to be fairly apprised of the grounds relied upon so as to enable the preparation of submissions dealing specifically with the issues raised, and for the court to be able to follow the submissions by counsel.

Section 307(i) uses the term that the person who is dissatisfied with any judgment sentence or order may *prefer* an appeal rather than that he has a right of appeal. That is because under s 312(i), the judge must decide whether to accept the appeal to be entered upon the list of appeals or to dismiss it summarily. By complying with s 304(iv), appeals that are vague, frivolous or vexatious may be dismissed summarily, and ensuring that appeals complying with the Code, or otherwise meriting revision can be given hearing and dealt with without undue delay with clear and precise submissions. To that end, particulars of points of law or points of fact where the court appealed from is alleged to have erred, must of necessity not only state the particular grievance or error, but how that error affected the finding so as to put the effect of the error in the proper perspective. It is good practice to set out the error and its effect, and then to provide the particulars in the judgment where the error is said to have occurred, since it enables the judge, whether acting under s 312(i) or at the hearing of the appeal,

to better follow the argument so that substantial justice may be done. It is in the appellant's best interests therefore to make out his grounds as clearly as possible. Where the grounds are not made out clearly, the appellant risks summary dismissal under s 312(i) for not having complied with s 307(vi).

The grounds of appeal in this case leaves much to be desired. For example, during submissions appellant's counsel asked for some grounds to be submitted upon together. It would at least be courteous if the court were informed earlier that the grounds were to be submitted upon together. Even so there were repetitions which could have been avoided if the grounds had been more carefully drafted. Even read together it did not set out the particulars of points of law in regard to which the learned magistrate is alleged to have erred, and the mischief of the error. It made it necessary to have to reserve judgment, notwithstanding lengthy submissions, in order to be able to review the record and judgment of the magistrate's court and the submissions further, to satisfy myself that I consider the appeal in the true contextual perspective of the alleged errors and to make an appropriate order thereon.

Returning to the appeal, a quick reference to s 182 and an overview of the evidence is necessary in order to appreciate the grounds of appeal in their contextual perspective. Section 182 of the Penal Code provides as follows:

> False information, with intent to cause a public servant to use his lawful power to the injury of another person
>
> Whoever gives to any public servant any information orally or in writing which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand ringgit, or with both.
>
> ILLUSTRATIONS
>
> (a) A informs the Inspector-General of Police that Z, a police officer subordinate to the Inspector-General, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Inspector-General to commence disciplinary proceedings against Z. A has committed the offence defined in this section.
>
> (b) A falsely informs a public servant that Z has contraband opium in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.
>
> (c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants but knows it to be likely that in

A consequence of this information the police will make inquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

It is important to bear in mind that s 182 incorporates a number of elements:

B (1) gives to any public servant any information orally or in writing,

(2) which he knows or believes to be false,

(3) intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant,

(a) to use the lawful power of such public servant to the injury or C annoyance of any person, or

(b) to do or omit anything which such public servant ought not to do or omit

if the true state of facts respecting which such information is given were known by him.

D The central issue in this case is whether the words ascribed to her in the charge, that is, '... *ada 4 lelaki Melayu cuba hendak culik anak saya dan dia (sambil menunding jarinya ke arah Abdullah Sani bin Hashim) adalah abang kepada salah seorang 4 lelaki yang mahu culik anak saya*' were in fact uttered by her to police officers L/Kpl Zamri bin Ithnin and Kpl Muhammad bin Yusof.

E

L/Kpl Zamri bin Ithnin (PW2) told the court that upon arrival at the school he met with Pradeep Kumar, who is the husband of the appellant who, 'beritahu saya ada 4 lelaki Melayu cuba culik anak beliau' and:

> Lepas dengar kata-kata lelaki itu, datang 1 perempuan India hampiri saya. Perempuan itu kata tadi ada 4 lelaki Melayu cuba culik anaknya dan beliau F menunjukkan ke arah 1 lelaki Melayu yang berada dalam kawasan sekolah tersebut.
>
> Beliau kata lelaki itu adalah abang kepada salah seorang 4 lelaki yang cuba culik anak beliau. ...

and

G

> Dia minta saya tangkap lelaki tersebut. Saya tidak tanya kenapa beliau nak saya tangkap lelaki itu.

The Malay man pointed out was Abdullah Sani bin Hashim (PW1). PW2 disagreed with counsel in cross-examination that the appellant did not ask him to make an arrest and that she did not make any complaint to H him.

It is trite that questions put by counsel in cross-examination and statements made by counsel during the trial, of themselves are not evidence of the facts suggested therein, except insofar as the witness admits or agrees with it. The court cannot assume to be true any insinuation suggested by a I question asked of a witness. A question is not evidence, and is considered only as it enables one to understand the answer. If a witness disagrees with a suggestion put to him in cross-examination, that means there is no

admission by the witness of that suggestion, and the party seeking to advance that suggestion must seek to prove it by other avenues or to abandon it.

Kpl Muhammad bin Yusof (PW3) said in evidence:

> Masa Zamri cakap dengan lelaki itu Sharma datang. Sharma adalah pengadu. Sharma datang kepada kami dan tunjuk 1 lelaki Melayu dalam sekolah dan Sharma beritahu lelaki itu adalah abang kepada 4 lelaki yang cuba culik. Dia beritahu kepada kami. ... .
>
> Setelah itu Sharma arahkan kami tangkap lelaki yang diberitahu tadi iaitu abang kepada salah seorang 4 lelaki.
>
> Sharma ada tunjukkan kepada 1 orang lelaki Melayu dalam sekolah. Jarak kami lebih kurang 50 kaki. Saya boleh nampak lelaki itu dari tempat Sharma tunjuk.
>
> Masa Sharma tunjuk ke lelaki itu lelaki sedang berdiri dikawasan sekolah.

There is no dispute the man pointed out was PW1. PW2 had said the appellant came about 1 minute later. He maintained this and disagreed with the suggestion it could be 10 minutes. To PW3, counsel put to PW3 that the appellant arrived 5-6 minutes after they met with Pradeep Kumar. PW3 disagreed and, confirming the evidence of PW2, said it was 1 minute. PW3 disagreed that the appellant did not inform them at any time '*ada 4 lelaki Melayu cuba culik anak*'. PW3 replied in the negative to counsel's question:

> Ingat ada sesiapa beritahu kamu bahawa Sharma takut dan boleh jadi memudaratkan anak beliau dan tidak kecualikan penculikan.

Upon close scrutiny, this is not contradictory of PW2's version because the question is about whether any person told him that Sharma was afraid etc, when the evidence of PW2 and PW3 was that Pradeep Kumar told PW2 that '*ada 4 lelaki Melayu cuba culik anak beliau.* Neither had said that Pradeep Kumar told any of them that '*bahawa Sharma takut ...*'. The evidence of PW2 is clearly corroborated by that of PW3. As police officers they were public servants. As a result of that information by the appellant, PW2 acted:

> Kemudian saya hampiri lelaki itu dan dapatkan I/C lelaki itu. Lelaki itu pun enggan beri I/C dan tanya kenapa kerana dia akan malu sekiranya beri I/C kepada saya. Saya kata saya perlu I/C beliau kerana beliau disyaki abang kepada salah seorang 4 lelaki yang cuba culik anak [beliau].

PW3 confirmed the evidence of PW2 that after PW1 was pointed out by the appellant, PW2 had proceeded to PW1. PW3 had remained with the appellant. The appellant called ASP Thomas on her handphone, and then told PW3 that ASP Thomas wished to speak with him, and:

> ... SIO Thomas suruh saya tanya lelaki apa sebab dia berada dikawasan sekolah.
>
> Thomas tidak tanya tentang kes penculikan. Saya cuma beritahu Thomas, Sharma beritahu ada 1 lelaki abang kepada 4 lelaki. Laporan Sharma serupa dengan apa yang dicakapkan kepada Thomas.

Peguam: Bantahan.

Mahkamah: Bantahan ditolak.

Maklumat yang saya beri sama seperti apa yang Sharma cakap iaitu ada 1 abang kepada lelaki Melayu yang cuba culik anak. Thomas suruh saya tanya lelaki apa sebab dia ada dikawasan sekolah. Semasa saya cakap dengan telefon itu kali pertama saya cakap dengan Thomas.

Abdullah Sani bin Hashim (PW1) gave evidence as follows:

Setelah saya nampak mereka, saya nampak OKS tunjuk kepada saya sambil bercakap dengan polis. Kemudian saya nampak 1 polis yang tadi berjalan ke arah saya dan tampil kepada saya. Saya cam polis berkenaan.

L/Kpl Zamri bin Isthnin dicamkan SP1.

Kemudian beliau minta IC saya dan saya terperanjat dan saya tanya 'apa hal encik ?'. Beliau kata 'adik encik dan encik disyaki cuba menculik anak perempuan itu (sambil tunjuk ke OKS)'.

Reaksi saya — 'Asthagfirrullah ...'. 'Bagaimana saya boleh jadi menculik sedangkan saya datang nak selesaikan masalah anak dengan HM.'

Saya masih berada di tempat yang sama ketika mula-mula saya nampak kereta peronda.

Ketika itu ramai orang di sekeliling sekolah. Perasaan saya amat aib dan malu kerana tidak pernah jadi sedemikian kepada saya.

Ketika OKS kata ada.

Peguam: Bantahan sebab tidak keterangan dan saksi ini.

Mahkamah: Bantahan dibenarkan.

OKS yang kata saya dan adik saya cuba culik anak beliau. OKS pada ketika itu berada luar pagar dekat kereta peronda.

Selepas beri penjelasan ke L/Kpl Zamri dan saya kata OKS biasa kerja dengan syarikat adik saya iaitu Dato' Abdullah Hisan. Saya kerja 1 pejabat dengan OKS.

Inilah adik saya — Dato' Abdullah Hishan bin Mohd Hashim IC 581017-08-6085 dicamkan SP1.

Saya tidak nampak Dato' Abdullah di kawasan sekolah.

Saya tidak tahu menahu 4 lelaki cuba culik anak OKS. Polis tadi tak kata siapa 4 orang itu. Saya tidak nampak 4 orang yang cuba culik anak OKS.

Kehadiran saya di sekolah — saya tidak tahu sama ada Dato' tahu atau tidak.

Selepas saya jelaskan kepada L/Kpl Zamri — 1 anggota polis pun datang ke arah saya. Saya boleh camkan dia.

Koperal Muhamad bin Yusuf RF 53338 dicamkan SP1.

The evidence of PW1 confirms the essential part of the evidence of PW2 and PW3 that the appellant pointed to PW1, and thereafter PW2 went to him and asked him to produce his identity card.

Much was made in cross-examination as to what PW1 was doing in school that day, notwithstanding his evidence he had brought his daughter to school and had seen the headmaster. He explained that at the time the police approached him he was 'berlegar-legar'. It was argued for the

appellant that PW1 said he was waiting to see the headmaster, and that Ruslan bin Madon (PW4), the headmaster contradicted this version when he said he told PW1 to come back the next day. To be fair, PW1 did not at any stage say he was waiting to see the headmaster again that day. Even if he were, there is nothing contradictory in a person waiting to see the headmaster again the same day even if he had been told by that headmaster to come back the next day. While it exhibits stubbornness, that in itself is not a contradiction. At worst it might irritate a busy headmaster, but it does not make that PW1 a liar. That he was at school because of his daughter cannot be doubted as his evidence that after speaking with the police he went back to his daughter's class was unchallenged.

PW1 said in court that PW2 said to him '*adik encik dan encik disyaki cuba menculik anak perempuan itu (sambil tunjuk ke OKS)*', while PW2 told the court that he said PW1 was suspected to be '*abang kepada salah seorang 4 lelaki yang cuba culik anak beliau*' (meaning the appellant) makes the evidence of PW2 unsafe. The question is whether this discrepancy is such a material discrepancy as to affect the credibility or veracity of PW2. Considering that PW1 was aware of the tensions between the appellant and his brother, saw the appellant point the police to him, having the police approach him and ask him for his identity card, it is easy for PW1 to have misunderstood PW2 and jump to the conclusion he too was suspected of being a kidnapper along with his brother. It is noted that the assertion of PW1 that PW2 told him that he was suspected of attempted kidnapping together with his brother was never put to PW2. If much is to be made of the discrepancy as a challenge to the veracity of PW2, then in all fairness the question ought to be put to PW2. In the light of all the evidence, not much ought in the circumstances to be made of the discrepancy, and it must remain as a minor or trivial discrepancy. In *Chean Siong Guat v PP* [1969] 2 MLJ 63, Abdul Hamid J held at p 64:

> In weighing the testimony of witnesses, human fallibility, observation, retention and recollection are often recognized by the court. Being a question of fact, what a magistrate needs to do is to consider the discrepancies and say whether they are minor or serious discrepancies. If, after considering the discrepancies, a magistrate finds that they do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard them as trivial and ignore them. On the other hand, if he finds that they relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth. In the present case, what the learned magistrate in fact found was that the discrepancies were minor and he quite properly ignored them.

In that case Abdul Hamid J referred to s 132 of the Evidence Act 1950 and *Sarkar on Evidence* (14th Ed) p 46 that: 'Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored as they are often a test of truth'.

ASP Thomas Woon Wei Chiow (PW6) confirmed the evidence of PW3:

A Saya terima panggilan lebih kurang 7.40am.

Saya tahu kerana lepas cakap dengan Sharma. Saya dengar dia kata pada anggota, Thomas nak cakap dengan you.

Saya ada cakap dengan anggota saya tanya anggota dan tanya apa berlaku. Anggota kata ada terima arahan dan bilik gerakan untuk menghala ke sekolah tersebut kerana ada orang nak culik anak dan saya tanya apa yang ada
B berlaku.

Konstable kata bila sampai ada jumpa dengan pengadu/Sharma dan beliau telah tunjuk ke arah 1 lelaki Melayu dan beritahu itu adalah abang kepada orang yang hendak culik anaknya. Saya tanya mana lelaki itu ada sekarang dan PC kata 1 anggota nama Zamri tengah periksa lelaki itu.

C Saya tahu saya ulang cakap dengan Kpl Mohd beliau adalah anggota MPV. Saya ingin cakap dengan OKS dan telah cakap dengan OKS saya tanya siapa lelaki Melayu.

It thus emerges that while PW2 went immediately to speak with PW1 as a result of the information given to him by the appellant, PW3 stayed with the
D appellant who rang PW6 on her handphone, spoke with him and passed the handphone to PW3. What PW3 conveyed to PW6 was therefore almost contemporaneous with what was related to PW2 and PW3 by the appellant, and in the presence of the appellant. PW6 then confirmed with the appellant what he was told by PW3, and he said:

E Beliau kata itu abang kepada orang yang nak culik anaknya dan saya tanya sekali lagi apa yang berlaku dan dia kata sebenarnya ini adalah pasal hal serve saman.

Beliau juga mengaku tidak mahu terima saman dan rasa takut anak akan diculik.

He then spoke with PW3 again:

F

Saya minta cakap semula dengan anggota untuk sahkan apa yang berlaku dan telah diberitahu Kpl Mohd yang mengikut Zamri, lelaki Melayu itu nama Abdullah Sani dan ini adalah pasal hal serve saman.

Saya kata jika ini pasal serve saman saya suruh catat butir-butir dan jangan buat tangkapan dan continue dengan tugas.

G Cross-examination of PW6 largely centered on previous reports of harassment and the appellant's fears for the safety of her family. He said that no action was taken on the reports because of the appellant's request not to investigate. In further cross-examination he said:

H ... Tidak setuju bahawa OKS tidak pernah beri arahan kepada supaya tidak siasat.

PW6 did not agree with counsel's suggestion:

Tiada OKS kata ada 4 lelaki Melayu datang nak culik anaknya.

In other words, the defence maintained even at the stage of the sixth witness
I in the prosecution case that she did not say the words alleged in the charge, notwithstanding that all the evidence of PW2, PW3 and PW6 remained unshaken.

Eric Paulsen (PW5) gave evidence that he came to the school area with Dato Abdullah Hishan, the brother of PW1, Abdul Aziz bin Hamzah (PW7) and Cheah Keat Swee. Their evidence is that at about 7.00 am they arrived to wait to serve two writs of summons upon the appellant and they attempted to do so at about 7.30 am when she arrived. She refused service and told them to serve the writs upon her lawyers. Having refused to accept service she went inside the school compound. Then there was a telephone call to the bilik gerakan by the appellant with the result that PW2 and PW3 were directed to proceed to the school.

I now turn to the grounds of appeal.

The background to grounds one and two of the appeal are as follows. The appellant was first produced before the magistrate on 10 March 1999, and a date for hearing was fixed for 11 May 1999. It was accepted that the date of 11 May 1999 on the record is a typographical error, the actual date being 17 November 1999. On that day Kartar Singh informed the magistrate that Gurbacan Singh was appearing before the Federal Court, and one Christopher had a case in the High Court in Ipoh. The magistrate stood down the case, which was called again at 11.30am. At the time the court was informed by Gurbacan Singh that Christopher Fernando was still in the High Court in Ipoh, and asked for a short adjournment because he:

(1) was appointed on 10 May 1999;

(2) was assisting Christopher Fernando who was the senior counsel;

(3) had filed something in the Federal Court but since the file could not be found in the registry, hearing could not proceed;

(4) was waiting for many documents involved in this case that was not yet received;

(5) needed a copy of a statement made by the appellant to ASP Manogaran;

(6) had asked the DPP but was told there was no cautioned statement.

The learned magistrate granted an adjournment of two days, and the trial on 19 May 1999 was to be treated as final and on priority. Counsel informed the court that the 19th was not suitable on the grounds he had to appear on another case. The learned magistrate set down the hearing date to 1 and 2 June 1999 as final and priority. Minutes after the case was adjourned, counsel came back, informing the court he had a case in the High Court on the 2nd and 3rd and applied for further postponement. The learned magistrate made the following order:

> Tarikh bicara ditetapkan pada 21 dan 22 May 1999 (B) final dan priority; tarikh 1 & 2 Jun 1999 dilapangkan.

The trial could not be completed on 22 May 1999. The record showed the court intended to continue on Monday 24 May 1999, but the dates were not suitable to counsel. The court agreed to set down continued trial on 4 June 1999. On 4 June 1999 the case could not proceed because Mr Gurbacan had gone to the High Court. The court was kept waiting until 10.55 am He told the court he did not know he had an appeal before the High Court that day. The record shows the following entry:

Mahkamah: Peguam memberitahu kenyataan mahkamah yang menegur beliau beliau berkelakuan agak biadap.

At p 117 of the record, at the stage where submissions of no case to answer had proceeded until 5.00 pm, the court ordered the submissions to continue on Monday 14 June 1999 at 10.30am. He was informed by Mr Gurbacan as follows:

Peguam: Isnin tidak boleh sebab trial Dato Seri Anwar dan ini adalah kes keutamaan dan pada hari yang sama saya ada kes dihadapan Justice Augustine Paul.

The order to continue submissions on Monday was maintained, but the time was set down to 2.30pm. On the Monday when the case was called, there was the following entry made:

Peguam: Saya telah tulis satu surat aduan berkenaan tangguhan kes walaupun saya ada kes di hadapan Augustine Paul dan kes Dato' Anwar.

Mahkamah: Direkodkan.

Peguam: Saya berbuat demikian kerana tidak mahu nampak berbuat sesuatu di belakang mahkamah. Walaupun kes (Anwar) telah ditangguhkan saya telah hadir dan kes 39B di HC telah ditangguh hingga esok.

At 4.45 pm that day the case was adjourned for continued submissions on the next day at 10.30 pm.

When the case was called the next day, the DPP informed the court that Mr Gurbacan Singh was appearing in a s 39B Dangerous Drugs Act 1952 trial in the High Court and that the trial was proceeding. There is the following entry at p 139 of the record:

OKS: Seperti yang diberitahu peguam saya ada kes di High Court pohon supaya kes ditangguhkan.

Mahkamah: Tangguh sebentar.

When the case was called again at 11.30am, there was no change and the record shows:

Mahkamah: Peguam masih tidak hadir kes untuk diteruskan walaupun permohonan anakguan direkodkan, nasihat saya kepada anakguam supaya anakguam catat nota.

Not very long after submissions commenced, it is noted at p 141 of the record that Mr Gurbacan Singh arrived:

Peguam: Saya hadir sekarang.

At the end of the submissions by the prosecution, Mr Gurbacan asked for a 15 minute adjournment before he made his reply. The application for adjournment was granted. At he end of submissions, the court set down 10.30 am on 21 June 1999 for decision as to whether the prosecution had made out a prima facie case.

On 21 June 1999, Mr Gurbacan Singh did not attend. The magistrate delivered his decision to the effect that the prosecution had made out a

prima facie case and the appellant was called to enter upon her defence. The trial was adjourned to 11 am. The following record appears at p 160 of the record:

Mahkamah: Kes ditangguhkan sebab peguam tidak hadir dan OKS tidak boleh bela diri sendiri. OKS juga nampaknya tidak tahu berapa saksi yang ingin dipanggil walaupun bersetuju dengan TPR, peguam sepatutnya ikut diari mahkamah. Mahkamah tiada sebab ikut diari peguam sebab mungkin beliau sibuk sepanjang tahun.

Kes untuk disambung bicara pada peringkat pembelaan pada esok hari 22 Jun 1999 jam 2.30 pm. Kes akan diteruskan dengan atau tanpa kehadiran peguam.

TPR: Ingin mula kes belah petang.

Mahkamah: 2.00 pm. 22 Jun 1999.

Mr Gurbacan was able to attend when the defence commenced. At 5pm the trial was adjourned and the magistrate agreed to the request that the continued hearing the next day be started in the afternoon. The court set down trial to continue at 2pm 23 June 1999. The trial continued and was at the end of the day adjourned at the request and suggestion of Mr Gurbacan Singh to 1 July 1999 at 11am.

On 1 July 1999 at 11am, Mr Gurbacan was not present, and the trial was adjourned to 12 noon. When the case was called at 12 noon, Mr Gurbacan was present and extended his apologies because he had an appeal in the Federal Court, and hearing had just completed. There was lengthy submission that day on the subject of bad character evidence, at the end of which the trial was adjourned to 10.30am, 2 July 1999 for decision and continued hearing. At the end of the day the trial was ordered adjourned to 5 July 1999 for continued cross-examination. Mr Gurbacan Singh's application for adjournment to 8 July 1999 and 9 July 1999 on the grounds that he had a part heard case before the High Court in Kuala Lumpur on 5 July 1999 and 6 July 1999 and an appeal on 7 July 1999 before the High Court in Ipoh, was rejected.

Mr Gurbacan was not present on 5 July 1999 when trial continued with cross-examination of the appellant. At 3.50pm, the trial was adjourned to 10.30am the next day since the appellant was unable to proceed in the absence of her counsel. She was advised to obtain other counsel.

At 10.45am, the next day the trial was unable to proceed. Mr Gurbacan Singh was still before the High Court in Kuala Lumpur. When the case was called again at 3pm, to the question whether she had appointed counsel:

OKS: Saya telah bercakap dengan peguam saya dan dia minta maaf ke atas ketidakhadiran kerana seperti alasan dahulu, dia ingin beritahu he is not caught in a frolic of his own but in the High Court which is superior to your court and takes priority.

Mahkamah: Beritahu kepada OKS bahawa ada 8,000 peguam di Malaysia dan 7,000 peguam ada di Kuala Lumpur.
Mahkamah perlu draw a line between public interest dengan OKS interest.
Mahkamah: Beri peluang hingga 10.30 a.m. .....

The court adjourned the trial to 7 July 1999 at 10.30am. On 7 July 1999, counsel was not present and the appellant applied for 24 hours adjournment. The application if granted would mean that the effect of the original application to adjourn to 8 July 1999 and 9 July 1999 would have been achieved, enabling Mr Gurbacan to attend, by the simple device of absenting himself and his client pleading of not being able to conduct her defence. The learned magistrate refused, and adjourned to 11.20am for final submissions. The appellant was asked to make her submissions. She told the court she could not make submissions. The court then called upon the DPP to make his submissions. A few minutes into the DPP's submissions, the appellant applied to stand down the trial to 3pm. The magistrate refused, and informed the appellant she could appeal. The magistrate then began to set out the defence (see p 243 of the record) when the appellant applied:

OKS: Pohon ke tandas.

The trial was adjourned, and the case was called again at 11.50am. Now the magistrate was informed that the appellant had a counsel to assist in her submissions. The magistrate refused:

Mahkamah: Permohonan ditolak saya telah beri masa yang cukup.

Submissions continued, and a Gurbacan Singh Johal informed the court he was just appointed 10 minutes earlier and:

... Saya pohon tangguh as pohon peluang untuk kaji semua kertas-kertas kes ini. Saya pohon 3 minggu.

Mahkamah: Tidak dibenarkan. Ini submission stage, kes pembela telah ditutup. Peluang telah diberi sebelum ini untuk lantik peguam tapi tidak dipedulikan kerana beranggapan mahkamah tidak jalankan kes tanpa peguam. Kamu boleh catit submission TPR dan buat reply.

Peguam: Tidak boleh jawab submission. Saya rayu untuk beri masa.

The magistrate refused and directed the DPP to continue submissions, at the end of which the trial was adjourned for 15 minutes before the defence was to make final submissions.

The record shows that when the case was called at 12.50pm:

Peguam: (1) Saya pohon [notes] of evidence of this case and exhibit
(2) reasonable period to confer dengan OKS dan peguam
(3) Saya tidak boleh submit hari ini. Dalam period ini dengan mutual appreciation for 2-3 weeks to do justice — to be seen rushing to come to conclusion by [by-]stander not ready.

Mahkamah: Suruh peguam submit.

Peguam: Saya tidak mahu submit as masa tidak cukup.

Mahkamah: Suruh buat submission

Peguam: Saya unable to submit.

Mahkamah: Kes ditutup as peguam tidak submit.
Peguam enggan submit.

Thereupon the trial was adjourned to 10 July 1999 11am for decision. On the day for decision, Mr Gurbacan Singh and Gurbacan Singh Johal appeared for the appellant. Mr Gurbacan Singh informed the court he had an application, that an application before the judge of the High Court was rejected. In respect of his non-attendance this is what the record shows:

> (2) Pohon maaf bagi OKS kerana tidak dapat hadir [—] pada 5, 6, dan 7.

The record shows he then proceeded in civil manner to apply to reopen the case. I will not go into the details of that submission, but only to say that the court allowed the trial to be reopened, including that the appellant may be recalled. The trial was adjourned to 12 July 1999 at 10.30am. After six witnesses, the defence closed and submissions were made. Submissions closed on 16 July 1999 even though counsel has informed the court the defence case would require two days. The hearing was adjourned to 23 July 1999 for decision.

And now the grounds of appeal this court is asked to consider are:

> The learned magistrate erred in conducting the trial with unholy haste and hurry and ordered repeatedly the case to proceed almost continuously on dates which were never schedule for the hearing of this case irrespective of whether or not the defence counsel was engaged in superior court which had fixed hearing dates prior to this case.
>
> The learned magistrate erred in considering this case a case of priority.

I have set out a detailed summary above so as to be able to avoid adding more comment to this appalling episode. The facts speak for themselves, when taken in the context of the applicable principles. The learned DPP is to be commended in not entering into lengthy submission on this subject and confining himself largely to supplying the court with the authorities.

Section 259 of the Criminal Procedure Code FMS Cap 6 ('the Procedure Code') makes provision as to the power to postpone or adjourn proceedings as follows:

> (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable ... .

From the record, all the days upon which the hearing was conducted was the subject of an order of court on the record. No hearing was heard at a time not reflected by a prior order. The hearings cannot be said to have been heard on dates not scheduled.

A The principle reflected clearly in s 259 of the Procedure Code is that a trial will proceed on the date fixed for the purpose and if it cannot be completed, it will continue until it is completed. It is not automatic: *Mohamed Ekram v PP* [1962] MLJ 129. In *PP v Tanggaah* [1972] 1 MLJ 207, Sharma J had this to say:

B > ... The policy of the law is that criminal cases should be disposed of with the least possible delay. Public interest demands that criminal justice should be swift events are still fresh in the minds of the witnesses and the public and that the innocent should be absolved of the crime as early as is consistent with a fair and impartial trial ... The longer the period is allowed to elapse from the time of arrest to the time the witnesses give evidence, the greater are the
C > chances of confusion and of truth veiled in obscurity .... The question of adjournment of a trial is a matter for the discretion of the court. That discretion, however is not an arbitrary one but has to be exercised judicially and only in cases which come within the terms of this section. The discretion as to adjournment is entirely that of the trial magistrate and is unfettered by any outside authority however high such authority be, irrespective of whether
D > it is the Public Prosecutor or a distinguished counsel. The rank or status of the accused is an irrelevant consideration. Until the matter comes up in revision even the appellate court acts in excess of its jurisdiction if it tells the trial magistrate to postpone a particular case. The discretion is that of the magistrate and of the magistrate alone.

The public interest lies in the principle that an unsustainable charge should
E not be left hanging over the head of an accused unnecessarily. Adjournments are an exception to the rule and reasonable cause for adjournment must be established. It is common to set aside a number of days for trial when a trial date is fixed. It is the court's best estimate of how long the trial would take. It does not mean that the court must not continue if the trial is not completed within that time. Much of the strain in the above
F appalling episode could have been avoided if the prosecutor knowing fully the evidence he needs to present taking into account the likely defences, and counsel who has specific instructions from his client of his or her defence and who are in a better position than the court which has only the charge before it, to know the length of time required had informed the court.
G Therefore, the prosecutor and the defence ought to notify the court of the time required for trial, and the court ought to take that into account.

The discretion to fix the date is with the court. As with all discretion, it is to be exercised judicially. But once the order is made, and whether one agrees with a decision or order or not, the law remains that once the court makes an order, it is to be complied with until it is set aside. As officers of
H the court, lawyers should be the last to ignore a court order. Absenting oneself from a trial with the knowledge that such an act would prevent a trial from proceeding, and contrary to an order refusing an application for adjournment is stepping off a dangerous precipice.

The Practice Direction [1961] MLJ xxxiii, in respect of adjournments
I issued on 7 April 1961 by PS Gill (as he then was) sets out the guiding principles in clear and unequivocal terms that stands to this day. It is worth reproducing in full:

It has been suggested that magistrates find difficulty in dealing with applications by counsel for adjournments to enable them to attend to other commitments both professional and non-professional. A

(2) Here two things must be borne in mind. The first is that the public interest demands that the work of the courts should be arranged and cases should be fixed so as to enable the maximum number of cases to be disposed of in the time available. If adjournments are granted, particularly at short notice, this involves disorganisation and waste of time with the consequence that the work of the courts gets into arrear. The other point to be remembered is that primarily so far as the court is concerned the duty to attend lies upon the accused person or other party and any obligation on counsel arises by reason of the contract between himself and his client. If a person is summoned to appear on a given date then he must appear on that date and the court is not concerned with the terms of any agreement which he may make with a practitioner to appear and represent him on that date. If he wants to be represented it is for him to arrange for a representative to be present at the time fixed by the court. B C

(3) The granting or refusal of an adjournment is always a matter of discretion but from what has been said it follows that normally adjournments should not be granted simply to suit the convenience of counsel and in particular they should not be granted because counsel wishes to attend to some other engagement. It is the business of counsel to manage his own affairs so that he does not put himself under obligations to be in two different places at the same time. D E

(4) Like any other general principle this must be construed reasonably. There are cases where it would be reasonable to grant an adjournment. One example is the case of sudden illness. Another is where an important case in another court has gone on beyond the date on which it could reasonably have been expected to end. Again when a date which has been fixed has to be varied then reasonable consideration should be given to the professional engagements of counsel concerned in fixing a new date. On the other hand there are cases where to grant an adjournment would clearly be unreasonable as where counsel wishes to go on holiday or attend a political meeting. It is impossible to give an exhaustive catalogue of all such possible instances. F

(5) If, however, magistrates exercise ordinary firmness in refusing adjournments which are asked for simply to avoid clashes of engagements that could reasonably have been foreseen then there will be ample scope for granting an adjournment in any case where to do so would be reasonable. G

(6) The argument , of course, will frequently be advanced, based on art 5(3) of the Constitution, that in a criminal case a party has some sort of absolute right to be represented by the counsel of his choice. The answer to this argument is that that article is to be read in the light of the following passage from the judgment of the Chief Justice in Federation of Malaya Civil Appeal No 34 of 1958: H

> 'It is wrong to say, as is frequently said, that a litigant is entitled to be represented by the counsel of his choice. The true statement is that he is entitled to be represented by the counsel of his choice if that counsel is willing and able to represent him.' I

A Reference was made to the fact counsel had to appear in superior courts. There is no principle that a lower court must vacate a hearing date because a counsel who is to appear in the lower court has to appear in a superior court. The powers of all courts to administer its own schedule remains with each court. Section 259 of the Procedure Code provides that adjournment may be granted for reasonable cause. Let it be understood that having to B appear in another court is not a reasonable cause, for it leaves it to the counsel concerned to decide on his own in which court he prefers to appear. If that be so, it is counsel who decides not the court, which case is to proceed. Even if the other court is a superior court, it is well to remember there is a heavier caseload in the lower courts than in the superior courts. C The record does not show any evidence placed before the magistrate in this case that the fact of having to appear in the lower court has been brought to the notice of the judge or judges of the superior courts, and that the latter has refused to vacate their hearings.

Every court no matter how humble is a court of law, whose orders until overturned or set aside, must be obeyed. The personal problem of D counsel having too many commitments for appearances in other courts cannot interfere with the schedule of the courts. Otherwise all trials can be postponed indefinitely by the simple device of every accused person appointing the same counsel and he accepts all appointments. That cannot be in the interest of justice and of other lawyers. Rule 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 clearly provides that: E

> 6(a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.

The rule does not directly cover all the issues in this case, but I have cited F it because (a) counsel accepted the brief when he was already involved in an ongoing trial, and (b) the rule illustrates the principle that counsel's desire to take up a case cannot precede the duty of being able to appear and represent the client on the required day.

Awaluddin bin Suratman & Ors v PP [1992] 1 MLJ 416 was cited. It is not applicable in this case since it dealt with furthering the cause of justice G in a case where since a counsel had just been retained for the first accused, a short adjournment would further the cause of justice as counsel would need the notes of evidence to be properly prepared to safeguard the accused's interest. The basis of the decision in that case was on another issue, that is the record did not show s 257(1) of the Procedure Code had been complied with. H

The true role of counsel as an officer of the court is to help point, to a court having to decide upon a serious matter as a charge of any criminal offence always is, the way to justice, not as some may think, to stand in the way of justice. Justice must always remain the humble duty of all parties, the counsel, the prosecutor and the court alike. With hindsight all parties may I think the matter might have been better handled. The fact remains that other than the assertion of an error in the grounds of appeal, nothing has been shown that the learned magistrate had in fact erred in law or principle,

and with the result that a miscarriage of justice has been occasioned. Indeed it must be said the learned magistrate had conducted his duties with rectitude and commendable restraint in circumstances in the trial which arose outside of the charge and the evidence, and which would test any court.

The third ground that PW1 is to be considered an interested witness weakens other parts of the defence submission relying on discrepancy from PW1's evidence. Be that as it may, even if the evidence of PW1 is held to be that of an interested witness, and needed corroboration, substantial and material corroboration exists in the evidence of direct and independent witnesses PW2 and PW3, which were further corroborated by the evidence of PW6. The fact remains that the evidence of PW2 and PW3, as well of that of PW6 remained at all times unshaken.

Ground 4 dealt with the lodging of the police report P1 some ten days after the event. The explanation given by PW1 was that he was ill for one day, and his lawyer had told him, correctly, that he may lodge a police report at any time. A delay in the lodging of a police report may diminish the evidential value of the report as evidence, but in this case the prosecution case does not rely on the police report for evidence to prove the charge. Again the evidence relied upon is that of PW2 and PW3 supported by that of PW6, all of whom, unlike the appellant and her husband, or even PW1, could not arguably have an interest.

Ground 5 is that the report P1 by PW1 is an afterthought, but even the submissions did not make it clear what the mischief is in P1 being an afterthought in the light of clear, unequivocal and above all independent evidence of PW2, PW3 and PW6.

Similarly ground 6. Even if the submission is accepted that P1 having been lodged ten days later could not amount to corroboration, the fact remains corroboration is unnecessary for the evidence of PW2, PW3 and PW6.

Ground 7 has been dealt with in ground 3.

Grounds 8 and 35 dealt with hearsay evidence. Ground 8 is written so generally that it ought to be dismissed outright. Ground 35 complained of statements being made by the appellant to PW2 and PW3 as being hearsay and inadmissible. No mention is made in ground 8 as to whose evidence is being objected to as hearsay. In submission counsel took liberty to deal with the evidence of PW1, PW2, PW3 and PW6 as objectionable on this ground. The objection to PW1 is that whatever PW2 told him of what the appellant told PW2 is inadmissible, and particularly because the version by PW1 as to what PW2 told him varies from what PW2 told the court he told PW1. If one were to think it through, dismissing this part of the evidence of PW1 would remove the suggestion of a discrepancy, which arose from the version by PW1. Its exclusion would in fact strengthen the prosecution case. But the submission misses the point that the issue is what the appellant told PW2 and PW3, and not as to the truth of what she told them. Her defence is that she did not say those words. In that context, a statement by PW2 to PW1 soon after as to what she said to PW2 is not hearsay, and being

A relevant to the question as to whether she did say those words, is admissible. By the same token the evidence of SP2, SP3 and SP6 are relevant and admissible.

Ground 9 involves the undisputed fact that the appellant had rung the bilik gerakan where her call was received by one En Shaarani. It was B En Shaarani who spoke to PW2 and PW3 in the patrol car telling them of a complaint by the appellant, and that they were to proceed to the school. En Shaarani was not called by the prosecution, but was offered to the defence.

It was submitted that the prosecution was duty bound to call witnesses essential to the unfolding of the narrative of the prosecution case, and it was C not sufficient to offer them to the defence. The case of *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 (SC) was cited in support. *Abdullah Zawawi v PP* [1985] 2 MLJ 16 is another authority on the point. The offering to the other party of a relevant witness from whom a statement has been taken, is to dispel any suggestion of withholding of evidence and to avoid the probability of an D adverse presumption being drawn. The requirement to call all witnesses essential to the unfolding of the prosecution case is simply the rule, expressed in different terms, that the onus is at all times upon the prosecution to prove all elements of the charge against the accused beyond reasonable doubt. In that regard, witnesses must be called to give evidence as to all the elements of the charge, whether as direct evidence or evidence E from which the inferences as to the elements of the charge may be drawn. I accept the answer that the charge is that the appellant said the particular words alleged to PW2. That then, and not the complaint to En Shahrani, is the prosecution case. The evidence of En Shahrani has nothing to do with the charge of what the appellant told PW2. Indeed, if what the appellant told Enc Shahrani is not true it could be the subject of another charge, but F that clearly is not the prosecution case here.

Ground 10 relies on the argument that there were contradictions between the evidence of PW2 and PW3 on the one hand, and the evidence of PW1, P1 and PW6 on the other. Placing aside the fact that this argument appears to go against the submission that the evidence of PW1, P1 and PW6 G are not admissible, the evidence of PW2 and PW3 are of direct and independent evidence of witnesses who gave evidence on sworn testimony and tested by cross-examination. The differences in the testimony are not material contradictions, but are mere discrepancies that, taking account of the fact the evidence of PW2 and PW3 remained unshaken, and suggest that the discrepancies are those naturally occurring H when a person is in a state of shock where he is alleged to be somehow involved in a most heinous crime. The submission that the allegation of culik was not in the evidence is incorrect, as is clearly apparent from the evidence of PW2, PW3 and from the excerpts of the evidence of PW6 I have quoted earlier above.

I Ground 11 refers to the undisputed fact that the husband of the appellant had first made the information to PW2 and PW3, and that the appellant arrived later. It was submitted that the magistrate ought to have

held as a fact that the information was given by the husband to PW2 and PW3. Whether the husband gave the same information is not the issue in the charge before the court. Indeed, whether the husband ought to have been charged also is not for the court to decide or comment upon since under the Constitution that authority is vested in the public prosecutor. The magistrate is only concerned whether the accused person before him said the words that were alleged. In seeking to understand how the ground may be of any consequence, there is a difference between the statements of the appellant and her husband, that is, it was the evidence of PW2 and PW3 that it was the appellant who specifically said, while pointing to PW1, 'tangkap dia'.

Ground 12,13 and 14 were taken together in submissions. Ground 12 must be dismissed outright. Disallowing or overruling an objection is not per se a ground of appeal, but only if the grounds of doing so is wrong in law. Ground 13 ought to be dismissed as being too general, and not specifying the evidence that is alleged to be irrelevant and to have caused grave prejudice. Indeed, the only material ground in this group submitted upon is ground 14, that is that the magistrate allowed evidence of bad character.

Section 54 of the Evidence Act 1950 provides:

> Previous bad character not relevant except in reply
>
> (1) In criminal proceedings the fact that the accused person has a bad character is irrelevant; unless evidence has been given that he has a good character, in which case it becomes relevant.
>
> (2) A person charged and called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless —
>
> (a) the proof that he has committed or been convicted of that other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;
>
> (b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
>
> (c) he has given evidence against any other person charged with the same offence.

Clearly s 54 is not an absolute bar against evidence of bad character. Other sections submitted upon are the following:

> 146 Questions lawful in cross-examination
>
> When a witness may be cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend —
>
> (a) to test his accuracy, veracity or credibility;
>
> (b) to discover who he is and what is his position in life; or

(c) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

148 Court to decide when question shall be asked and when witness compelled to answer

(1) If any question relates to a matter not relevant to the suit or proceeding, except so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it does not think fit to compel him to answer the question, warn the witness that he is not obliged to answer it.

(2) In exercising its discretion, the court shall have regard to the following considerations:

(a) the questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(b) the questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect in a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(c) the questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(d) the court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable.

The essence of counsel's submission is that s 54 cannot be defeated by resort to or misuse of ss 146 and 148. Now, s 54 is in that part of the Act dealing generally with character evidence. Section 146 is a specific section as to questions lawful in cross-examination. The issue here is whether cross-examination that tends to show bad character is barred under s 54 even though it is for the purpose of, as the prosecution maintains, testing the veracity of the appellant.

In *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 at p 84, Hashim Yeop A Sani SCJ (as he then was) speaking for the Supreme Court said:

> ... it is trite law that where the words of a statute are clear there is no room for the court to go beyond the expressed language of the statute.

In *Magor & St Mellons Rural District Council v Newport Corp* [1951] 2 All ER 839, the House of Lords held that in the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed, and that to do so would be to usurp the function of the legislature. The judicial function then is that of interpretation; it does not include the power of amendment

under the guise of interpretation'. To restrict the meaning of s 146 by an earlier and general section such as s 54 would amount to an amendment of s 146.

The words of ss 54 and 146 are clear. Bad character evidence per se is not relevant, but the section makes it clear that the bar can have exceptions. Section 146 specifically provides that questions may be put to test his accuracy, veracity or credibility. It widened the area of exceptions. The following illustration will clarify the issue. Evidence that a person murdered someone is always capable of being interpreted as evidence of bad character. But if he is charged with murder, evidence that he did murder the victim as charged is relevant and always admissible. Evidence that he had murdered another person might well be barred, although there are exceptions. If all evidence of a criminal act is barred as evidence of bad character, no crime could be proven. Such an interpretation is a gross misinterpretation of the law.

In this case photographs of the appellant dancing closely with the one Dato' Abdullah Hishan and of travelling together with him were relevant evidence and therefore admissible to disprove the assertion by the appellant that at the relevant time the appellant was being harassed and intimidated by the said person. Such evidence was in effect made relevant by the appellant when she made those assertions as a central part of her defence. If such or similar evidence is intended by the Evidence Act to be barred, then there would be no purpose in the following sections:

> 151 Indecent and scandalous questions
>
> The court may forbid any questions or inquiries which it regards as indecent or scandalous, although they may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.
>
> 152 Questions intended to insult or annoy
>
> The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.

Even if the questions relate to matters that are indecent or scandalous because she is a married woman at the time, the questions were clearly not intended simply to insult or annoy, but clearly relate to facts in issue or matters necessary to be known and which the court has the discretion to admit into evidence.

The ground refers to strenuous objections by counsel. While it is common to describe objections as strenuous or strong, it must be remembered that it is the merit of the objection that determines the ruling. The fierceness or volume of objection cannot clothe the objection with any additional authority other than its own merit.

In grounds 15 and 16 the issue raised is that the magistrate did not say that he has applied a maximum evaluation, or that he had applied the test of proof beyond reasonable doubt. This is an issue of much concern in

appeals. The record shows that the magistrate recorded the following at the end of the prosecution case:

> Setelah mendengar keterangan saksi-saksi pendakwaan, mendapati pihak pendakwa telah berjaya membuktikan satu kes prima facie bagi pertuduhan utama yang dipinda terhadap orang kena saman. Dengan ini orang kena saman dipanggil untuk membela diri.

The learned magistrate had not departed from the wording of s 173(h) of the Procedure Code. While he did not say he had applied a maximum evaluation or that he had applied the beyond reasonable doubt test, it cannot be said that he said he had applied any other lesser standard. The argument that the benefit of the doubt should be given to the appellant, is answered by s 114(e) of the Evidence Act 1950 that judicial acts are regularly performed, in other words that unless he had said he has applied another or lesser standard, he is deemed to have applied the correct standard where he has used the exact words of the statute.

Further, it is clear that after the close of the prosecution case, no further evidence against the appellant was adduced towards directly proving the elements of the charge against her. The only further evidence adduced is by the appellant in her defence. The evidence directly relied upon in holding that the prosecution has proved its case beyond reasonable doubt is the same evidence that was on record in the prosecution case. It cannot be said the magistrate could not have called for the defence unless he had applied a lesser standard.

Grounds 17 and 21 read together ought to have been rejected as being too general, and the wide ranging submission made on the ingredients of s 182, and evidence thereon accords with that view. They touch on findings already dealt with above. The submission that the husband Pradeep Kumar was the first to give the information has already been dealt with: it is of no relevance to the question in the first ingredient whether the appellant gave false information to PW2. The evidence of PW2 and PW3 were unshaken that the appellant did say the words as alleged and that pointing to PW1 as a brother of one of the four Malay men, said 'tangkap dia'. Counsel also sought to make an issue of the lost station diary and of pocket diaries of PW2 and PW3 which was never produced. There was no evidence suggesting that PW2 and PW3 had written down notes of what had happened in the pocket diaries. They did say in evidence that they had not written anything in their pocket diaries. Counsel submitted that D30, being the notes of messages, did not allege the words as in the charge. A perusal of D30 shows it is a record of movements, including the direction to proceed to the school at Bukit Bandaraya. From its nature it is not a full record of all that transpired in the form of complaints, information and findings. Even so, far from contradicting the prosecution and assisting the defence, the record shows a note 'butir2 suspek Abdullah Sani', the number of his identity card and address and a brief note that it was an office matter that was brought outside.

Kpl Md Bajuri bin Hj Mokhtar (PW8) was called to give evidence of the missing diaries. He mentioned that PW3 had once asked for the diary

to take photostats. It was argued PW3 should have divulged the fact he had taken photostats. The submission, regrettably, goes against the rule that a witness answers questions in court, and not make speeches. Having found that PW8 said that PW3 had made photostats, PW8 could have been asked if the photostats were certified by him as true and correct copies. PW3 could have been re-called as to whether copies made were still in existence. Since these were not established, the existence of the photostats, and the content remain speculative. No purpose is served to make too much of it when there are no specific assertions made, but that the request for the document is only a fishing expedition that it might contain something useful, and if the content is against the appellant, then objection may well be made that it is hearsay. The rule applies to all parties that instructions, investigation and preparation is made before trial and that a trial is not the forum to conduct an amateurish investigation by lawyers, but for the prosecution to produce its evidence, the defence to test that evidence against its bona fide defence laid out, and if the defence is called, to produce evidence supporting its defence to raise a reasonable doubt.

It was submitted that a security guard named Khairuddin at the school should have been called, and that the failure to do so by the prosecution attracts an adverse presumption under s 114(g) of the Evidence Act. There is no suggestion that this Khairuddin was anywhere near the appellant, PW2 and PW3 when the information was given by the appellant, and if his evidence is necessary to support the assertion of the defence that there was in fact a possible kidnap attempt, it is for the defence to call him. There is no provision in the Evidence Act, the Procedure Code or any principle of procedure that requires the prosecution run through an obstacle course to disprove as various assertions are made in cross-examination. While the burden it always upon the prosecution to prove its case beyond reasonable doubt, it is its only burden.

Secondly it was argued that the appellant, in view of the previous reports of threats and harassment, cannot be said to have known or believed the information to be false. It was submitted that even a suspicion would be sufficient not to constitute an offence. To this end it was also submitted that the allegation of four Malay men could not have been the men who came to serve the writ of summons, being one Malay named Aziz, a Chinese and Eric Paulsen. If the defence is that there were four Malay men, it would appear it is for the defence to bring some witness evidence to raise a reasonable doubt. The prosecution case is that the information was false, and not that the four Malay men were Eric Paulsen and his associates. The evidence of PW3, of his report to PW6 that it was a service of a writ of summons matter that the appellant resented, confirmed by the evidence of PW6, who asserted he confirmed it with the appellant, which assertion was not challenged in cross-examination lends very strong grounds that the appellant knew or believed her information to PW2 to be false.

Thirdly it was submitted there was no allegation of criminality against PW1. That might well be true of the information given by the husband, Pradeep Kumar. The information by the appellant went beyond that given by Pradeep Kumar when the appellant pointed to PW1 and said 'tangkap

dia'. The inference that a person ought to be arrested is that he is somehow involved in the alleged crime. The statement 'tangkap dia' is corroborated by the defence evidence D30 describing PW1 as the suspect. Her report about an hour later stating 'I do not rule out kidnapping' confirms that kidnapping had been in her mind.

As to grounds 18 and 19. The court was informed that the issue had been dealt with in ground 10; but would add that the evidence of SP1 that he was waiting to see the headmaster was contradicted by the headmaster who was called as PW4. This matter has been dealt with earlier above.

In ground 20, the submission made is as follows:

> P1 is not the first information report. The complaint made by the appellant at about 7.50 am as in D30 is the first information report. Alternatively P11 is the first information report.

It was submitted that P1 is not the first information report, and being a statement made in the course of police investigation, was inadmissible. *PP v Ismail bin Atan* [1993] 2 CLJ 1253 and *PP v Foong Chee Cheong* [1970] 1 MLJ 97 were cited for the proposition that the report P1 is not a first information report, and was therefore inadmissible. If P1 were wrongly admitted, its admission did not benefit the prosecution as much as the defence in view of the argument that the allegation in P1 that the appellant said '*Perempuan itu membuat aduan bahawa adik encik dan encik disyaki mencuba menculik anaknya*'; contradicted the charge. It is evident that the learned magistrate in any case had not relied upon P1 as the basis of conviction and it cannot be said the admission of P1, even if it were wrongly admitted, had, in the light of other direct evidence, occasioned a miscarriage of justice.

Ground 22 alleged that the evidence of PW2 and PW3 were materially contradictory, and counsel adopted his earlier arguments in relation to grounds 17 and 21 on the second ingredient. I have dealt with the issue.

Similarly, ground 23, it was submitted, rests upon s 54, 146 and 148 of the Evidence Act which has also been disposed of earlier above.

Ground 24 as to non-production of the station diary and pocket diaries has been dealt with also.

Ground 25 argues that the mere making of inquiries by PW2 and PW3 at the instructions of PW6 did not amount to causing annoyance to PW1 especially since PW1 refused to give his identity card, and that he was never placed under arrest or even detained for inquiries. The fact remains if the true facts were known to PW2 and PW3, PW1 would not have been approached and questioned. The appellant had specifically pointed to PW1 and asked PW2 to '*tangkap dia*'. Read together with '*dia adalah abang kepada satu daripada 4 lelaki Melayu*' who tried to kidnap her son, an allegation which could involve the death penalty, the statement '*tangkap dia*' to policemen who did not know that PW1 had legitimate reasons to be in the school, clearly implies that he was involved in the attempt to kidnap. The fact he was approached by PW2, a policeman, and asked to produce

his identity card obviously caused annoyance as he refused to provide his I/C. It is clear that eventually he did, as is evident from P30 that I have had occasion to refer to earlier. The only reason that PW1 was not arrested was explained by PW6, that he gave instruction not to arrest since PW3 had reported that the matter arose out of the service of a writ. This was corroborated by P30 which recorded that the disturbance arose out of an office matter:

> .... Tidak puas hati soal kerja di pejabat sehingga terbawa-bawa ke luar. Setelah butir-butir peribadi diambil ... ronda semula ...

Had PW1 been arrested, and in view of the seriousness of an allegation of involvement in kidnapping, a much more serious sentence would have been occasioned.

This leads us to ground 28 where the submission was made that no investigation was carried out. The evidence of PW6 and that of PW2 and PW3 relied upon were absolutely clear. In particular, PW6, who it must be recalled, was telephoned by the appellant, told the court the appellant admitted after PW3 reported to him, that the disturbance arose out of the service of a summons. That being so, there was no further need to investigate, the waste of time of which would have further aggravated the offence.

It was argued in ground 29 that the statement of the appellant ought to have been introduced into evidence. Such a statement, taken in the course of investigation, was not part of the charge and not part of the prosecution case.

In ground 30 it was argued the magistrate ought to have considered that PW1 was an interested party because of the problem between PW1's brother and the appellant. Perusing the various reports to the police, PW1 had never been mentioned as having been involved in the alleged harassment and intimidation, and only in the report made on 5 January 1998 was PW1 mentioned for the first time. The decision of the learned magistrate was based upon the evidence of PW2 and PW3, corroborated by the evidence of PW6 who spoke with PW3 and the appellant contemporaneously as PW2 spoke with PW1, and the learned magistrate correctly appreciated that the various issues raised by the defence were peripheral issues that did not affect the evidence of the three police officers who were independent of the parties involved with Dato' Abdullah Hishan and the appellant.

It was argued in ground 31 that the magistrate ought to have considered that the information given could be correct, and that the husband Pradeep Kumar admitted giving the information but has not been charged. These issues have been dealt with earlier above. The evidence of PW2 and PW3 were clear that the appellant gave the information, and the additional words '*tangkap dia*'. If there were uncertainties in the evidence of PW2 and PW3, and of PW6, then D17, D30 and D11 could possibly become of some relevance to resolve the uncertainty, but that situation does not arise here.

A As to ground 32, discrepancies between the evidence of SP5 and SP7 are in the context of this case not material because SP5 and SP7, the appellant herself argues, are not alleged attempted kidnappers.

Ground 33 wa as to the various reports made by the appellant of harassment. If the person pointed out to PW2 and PW3 was Dato' Abdullah Hishan, and not PW1, those reports would have to be considered B relevant, but an accusation against PW1, not at any time mentioned in the reports, is hardly relevant and need not be considered.

In ground 34 it was argued that in law it was necessary for SP2 and SP3 to make a complaint. That submission relied upon s 195 of the Indian Criminal Procedure Code, which substantially differs from the Malaysian C provision. When the issue was raised and counsel given opportunity to check and submit further, counsel returned and confirming the difference, withdrew his ground.

The basis of ground 35 as submitted was that s 113 of the Procedure Code bars the evidence of oral evidence of statements by the appellant to D SP2 and SP3 who were below the rank of inspectors. To my mind that is a misapplication of s 113. Section 113 is applicable where the statement is made by a person who is charged with an offence, and where the statement relates to the offence with which he is charged. Section 113 is not applicable where the statement given, whether to an inspector or other public servant, is itself the subject matter of the charge, and not merely evidence of another E charge.

Ground 36 repeats the complaint that Pradeep Kumar had given evidence he gave the information to PW2 and PW3 and had not been charged. It was submitted that the fact he was not charged raised a reasonable doubt. This submission differs from the strict terms of the F ground, that is simply that he was not charged, which is not a relevant matter for the reasons given earlier above. There is an essential difference between the information given by the appellant and Pradeep Kumar and that is that it was the appellant who asked that PW1 be arrested. The request to arrest involves the suggestion of PW1 being involved in the alleged offence.

G Ground 37 has been dealt with earlier, and it was never part of the prosecution case that PW5 and PW7 were involved in a kidnap attempt. The basis of the prosecution case is that the information by the appellant to PW2 and PW3 were false, and PW5 and PW7 could not have been mistaken for attempted kidnappers.

H Ground 38, that the appellant was justified in giving the information alleged, has been dealt with earlier. Given that PW1 had not been the subject of earlier complaint by the appellant, there is no basis whatsoever for an allegation that PW1 was involved in a kidnap attempt. Harassment, intimidation, including threat to kidnap, are quite different from a kidnap attempt, which is what is the substance of the appellant's information to I PW2 and PW3, and which, according to PW6, she admitted to be untrue.

In ground 39, the appellant complained that while the appellant in her evidence gave evidence of intimidation and harassment by Dato' Abdullah

Hishan, the prosecution did not call Dato' Abdullah Hishan, not even as a rebuttal witness. The ground has no merit because Dato' Abdullah Hishan was not part of the prosecution case against the appellant. That allegation of any threat or harassment, even if true, has nothing to do with the charge and the prosecution case which is about giving false information against PW1. A

It is an established principle as raised in ground 40 that an accused person need only to raise a reasonable doubt. It is clear from the whole of the evidence that the evidence advanced by the defence did not relate to PW1 and did not raise any reasonable doubt to the charge she gave false information to PW2 and PW3 about PW1, and according to PW6 admitted that the matter arose out of an attempt to serve a writ of summons upon her. B C

In ground 42, it was argued because D11, being the appellant's report, was not investigated, it cannot be said to be false. D11 was made after the information which is the basis of the charge was given to PW2 and PW3, and it is clear from the evidence of PW6, D30 admitted by the defence, and the evidence of PW2 and PW3 that that information was false. D

In ground 43, it was argued that because the appellant did not know Dato' Abdullah Hishan was anywhere near the school, it was inherently incredible that she could have given the information. Superficially it may be so, but by the same token, it is what makes the information involving an accusation against either PW1 or Dato' Abdullah Hishan false since there would have been no reasonable grounds to suspect them of being involved in a kidnap attempt. E

Ground 44 has been dealt with in dealing with ground 9.

Ground 45 argues that the appellant's solicitor's letters to Karpal Singh written the same day (D17, D34) had high probative value and that the magistrate failed to consider it. In my opinion, the magistrate would have erred if he gave the letters any probative value since by the evidence of the independent witnesses, particularly PW6, the information by the appellant to PW2 and PW3 was untrue, the appellant admitted it to be so, and as a result the police did not take further action against PW1, and as D30 shows, PW2 and PW3 resumed their normal patrol. F G

Ground 46 repeats the argument that the information did not involve any complaint of wrongdoing or criminality against PW1. From the evidence that might be a sustainable argument if a charge is preferred against the husband Pradeep Kumar, but not in the charge against the appellant who demanded '*tangkap dia*' when pointing to PW1, who also clearly had the impression he was accused to be, together with his brother, involved in an attempt to kidnap the appellant's son. D30, admitted into evidence by the appellant, clearly described Abdullah Sani (PW1) as a 'suspect' in the report. H

The reason for rejecting ground 47 has been dealt with earlier above, primarily in dealing with grounds 17 and 21. In all the circumstances, there is no basis for a conclusion, as advanced in grounds 48, 49 and 50, that the prosecution had only raised a suspicion. I

A Ground 51 relates to bad character evidence. That has been disposed of earlier above. The submission that the learned magistrate relied on conjecture and surmise is unwarranted. The learned magistrate had considered and dealt with all the possible concerns and rejected them in arriving at his conclusion based on the evidence of PW2, PW3 and PW6. The judgment reflected a process of consideration of various possible B doubts, and properly drew his conclusion from the appellant's refusal to answer. The appellant had every opportunity to answer the questions in the presence of counsel when the trial was reopened, by dealing with those issues in her evidence, but did not do so.

Ground 52 was dealt with earlier in grounds 9 and 33.

C Ground 53 relates to an observation by the learned magistrate that the appellant was looking at Mr Gurbachan Singh while being cross-examined. That was admitted to be true. The magistrate has power to do so under s 271 of the Procedure Code. The real grievance is that of counsel who resented the suggestion that he was suggesting answers. The learned DPP D agreed that there was no allegation that counsel was suggesting answers. The matter should end there. In his judgment the learned magistrate referred to his note that 'peguam telah cuba memberi isyarat jawapan kepada OKS' although the notes do not show that counsel had been warned. Having said that, it must be noted that this episode was mentioned in passing, and no action was taken against counsel. And as the judgment E shows, the magistrate did not draw any conclusions from that fact alone for his findings. I have considered counsel's request to expunge that part of the record. I have decided not to do so as such a step would set the precedent that any such note of any observation by a trial judge must be notified and argued with the parties before it could be noted down. There can be no such principle. Counsel had notice of the notation when the appeal record was F completed, but had not, other than in oral submission, sought to adduce any evidence to the contrary. In the circumstances, I must leave the matter there.

Ground 54 was abandoned in submission.

Ground 55 argues that the magistrate had not given a reasoned and G speaking judgment. I have read the judgment over and over, and it is clear that the learned magistrate had given a clear and reasoned judgment setting out all of the relevant matters he ought to consider and had not wasted time with irrelevant matters. The rule as to a speaking judgment means that the judgment must be able on its face to explain its decision, but it is not H necessary that it must, ad nauseum, deal with every petty, frivolous or irrelevant argument. Such arguments could be easily seen for what they are and could not affect the decision made.

All of the grounds of appeal in relation to conviction are based on arguments on facts. As correctly pointed out by the learned magistrate, these arguments centred on peripheral facts that had little if any effect on I the unshaken evidence of direct, independent witnesses PW2 and PW3 who from the record, gave evidence in clear, unequivocal and matter of fact manner. So did PW6, who provided, although unnecessary, corroboration.

There were no important legal issues to be decided, even though some effort has been made to refer to such questions, because in the particular fact situation and the evidence, the legal issues sought to be raised were irrelevant or inapplicable.

The appeal against conviction is therefore dismissed.

Ground 56

All of the grounds argued in respect of sentence had been advanced upon the learned magistrate and he had considered them. There is no specific submission that he had erred in law or that the sentence was manifestly excessive.

While a sentence of imprisonment under s 182 is not mandatory, it must be noted s 182 related to false information to a wide range of public servants. In many cases such false information may be of little consequence, such as false information to a public servant with little authority.

But information to a police officer is a different matter. The public demands that when a report is made to a police officer, he will take action. Life and limb or property may depend upon prompt action. By the same token, the police are entitled to expect that information given to them must be true or reasonably believed to be true, so that they may with justification act. Police investigation actions involve arrests, or holding a person under remand for investigation, and requiring witnesses to wait and give statements. These actions impinge upon the fundamental rights and liberty of other persons, and are not to be taken lightly.

In addition, the false information in this case is of the most serious nature, involving a possible death penalty. The entire matter might have ended at the school after the police left. But clearly the appellant wished the matter to go much further, lodging a report about an hour later which although in slightly different terms did not rule out kidnapping.

In all of the circumstances, and having considered possible application of s 173A or s 294 of the Procedure Code, taking into account that no arrests were made, I cannot say that the sentence of the learned magistrate is manifestly excessive or wrong in law.

The appeal against sentence is hereby dismissed.

Appeal dismissed.

Reported by Jafisah Jaafar